INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	3
Argument	6
Conclusion	8

CITATIONS

Cases:	
Barbour Coal Co. v. *Commissioner*, 74 F. 2d 163, certiorari denied, 295 U. S. 731	6
Boehm v. *Commissioner*, 326 U. S. 287	6
Rand v. *Helvering*, 116 F. 2d 929, certiorari denied, 313 U. S. 594	7
Shoolman v. *Commissioner*, 108 F. 2d 987, certiorari denied, 310 U. S. 637	6
Simmons Co. v. *Commissioner*, 33 F. 2d 75, certiorari denied, 280 U. S. 588	6
Statute:	
Internal Revenue Code of 1939:	
Sec. 23 (e) (26 U. S. C. 1952 ed., Sec. 23 (e))	2, 6
Miscellaneous:	
Treasury Regulations 111, Sec. 29.23 (e)–1	2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 388

F. E. MEYER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 27–32) are not officially reported. The opinion of the Court of Appeals (R. 40–44) is reported at 243 F. 2d 262.

JURISDICTION

The judgment of the Court of Appeals, affirming the Tax Court's decision, was entered on April 25, 1957 (R. 45). The petition for a writ of certiorari was filed on August 20, 1957, the time for filing the petition having been extended to August 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the court below correctly affirmed the Tax Court's decision that petitioner did not sustain a deductible loss in 1949 because his patented card punching device became worthless prior to 1949 and petitioner was apprised of such worthlessness.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * * * *
>
> (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *
>
> * * * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

> SEC. 29.23 (e)–1. *Losses by Individuals.*—Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise are fully deductible if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, * * *

> In general, losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. * * *
>
> * * * * * *

STATEMENT

The facts found by the Tax Court are as follows:

Petitioner has been employed by the Northern Pacific Railroad since 1920 as a clerk in the Revised Rates Division and associated departments in freight accounting. His job has been concerned primarily with the auditing and tabulation of freight receipts. For tabulating purposes with respect to these freight receipts, the railroad in 1920 was using machines which it rented from International Business Machines Corporation. The tabulating machines recorded information by punching small holes in cards. Petitioner conceived the idea of inventing a card punching device which could be attached to any ordinary typewriter so that the typewriter could be used to tabulate information by punching cards in addition to typing other information on the cards. Petitioner had a machinist alter an old hand-punching machine and adapt it to a typewriter. Petitioner was issued a patent on this machine on December 19, 1922. (R. 28.)

Functional defects, however, prevented successful manufacture of the patented machine. During the years from 1922 to about 1941, petitioner attempted

to have these defects corrected. The principal difficulty with the machine, as originally designed, was that it required an extremely hard stroke on the typewriter key in order to make the device punch a hole in the card. This was eventually overcome by installing a "toggle motion" on the device which made it easier to punch a hole in the card. After the change, however, the punching device would stick in the card and the key would not return to its normal position. This difficulty was overcome by installing springs under the keys. This change, however, brought back the original trouble. Some time prior to 1941, a man named Kraft altered the working model of the machine so that it operated electrically. Much of the difficulty previously experienced was eliminated, but the machine was still not perfected. Petitioner and Kraft were issued a patent on the electrical machine on January 14, 1941. Kraft subsequently assigned his interest in the patent to petitioner. In 1942, petitioner had some additional work done on the machine to put it in "good operating form", but this was not accomplished and the machine was never perfected. (R. 28–29.)

Petitioner tried unsuccessfully to acquire backing to perfect the machine or to sell it and the patent outright. In 1934 or 1935, petitioner had an attorney form a Delaware corporation. The corporation never sold any stock or performed any corporate function. It was abandoned by petitioner, and on July 1, 1938, became inoperative and void for nonpayment of taxes under Delaware law. After petitioner abandoned the corporation, he made further trips to New York,

Detroit, Chicago, and other places for the purpose of interesting people in the machine, but he never found a backer or buyer. In 1947, petitioner made a trip to Chicago and discussed his machine with various people. From these discussions, petitioner was made aware that his machine, even if perfected, was and for several years had been antiquated and outmoded. (R. 29–30.) His machine was created for needs existing in the 1920's. (R. 31.)

On his income tax return for 1949, petitioner claimed a loss deduction of $6,340 for expenditures made "in perfecting the [second] patent and attempting to establish a manufacturing agency to manufacture and sell the product". (R. 30.) These expenditures were made during the years 1926 through 1942 and included the sum of $1,275 expended to incorporate and sell stock. (R. 30.)

The Commissioner determined a deficiency in income taxes for the year 1949 on the ground that in that year petitioner did not sustain a loss of $6,340.[1]

---

[1] The deficiency for 1948 and a part of the deficiency for 1949 result from the determination by the Commissioner that taxpayer failed to report interest payments of $180 received in each of those years. (R. 27). Error was alleged as to the Commissioner's determination that taxpayer failed to report interest received, but no evidence was offered in the Tax Court and no argument was made on this issue either in the Tax Court or in the Court of Appeals. The Tax Court sustained the Commissioner's determination on the ground that this issue was abandoned. (R. 27.) The Court of Appeals agreed. (R. 41.)

The Tax Court sustained the Commissioner's determination, holding that petitioner did not sustain the loss claimed during the year 1949 because his invention was obsolete and worthless prior thereto and he was apprised of such worthlessness. (R. 31–32.) The Court of Appeals affirmed. (R. 45.)

ARGUMENT

Section 23 (e), Internal Revenue Code of 1939, *supra*, p. 2, provides that losses of an individual which are incurred in any transaction entered into for profit are deductible. The deduction must be taken in the year in which the loss is sustained as evidenced by closed and completed transactions, fixed by identifiable events. *Shoolman* v. *Commissioner*, 108 F. 2d 987 (C. A. 1st), certiorari denied, 310 U. S. 637; Treasury Regulations 111, Section 29.23 (e)–1, *supra*, pp. 2–3. The test for determining the year in which a loss is deductible under Section 23 (e) is a practical and flexible one, depending upon the circumstances of each case. *Boehm* v. *Commissioner*, 326 U. S. 287, 293.

In no event could the sum of $1,275, which purportedly was spent to incorporate, constitute a deductible loss in 1949. This sum was organizational and stock selling expenses and was deductible no later than 1939 after the corporation became inoperative and void and petitioner abandoned it. *Simmons Co.* v. *Commissioner*, 33 F. 2d 75 (C. A. 1st) certiorari denied, 280 U. S. 588; *Barbour Coal Co.* v. *Commissioner*, 74 F. 2d 163 (C. A. 10th), certiorari denied, 295 U. S. 731.

No question of loss for 1946 (Pet. 5–6) is an issue in this case.

The question here involved, i. e., whether petitioner's invention became worthless in 1949, is thus one of fact (*Rand* v. *Helvering* 116 F. 2d 929 (C. A. 8th), certiorari denied, 313 U. S. 594). The Tax Court found that the claimed loss was not sustained in 1949 since petitioner's invention became worthless prior to that year and he was apprised of such worthlessness. (R. 30, 31–32.) The Court of Appeals agreed that the Tax Court's findings were supported by the record and that "it is obvious from the undisputed facts that the patented machine had become commercially worthless long before 1949". (R. 42, 44.) Clearly, there is no basis for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
CHARLES B. E. FREEMAN,
Attorneys.

SEPTEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957